***United States Court of Appeals***

***for the Second Circuit***

# APPENDIX

# 75-4225

In The

## United States Court of Appeals

For The Second Circuit

September Term, 1975

RAFAEL ALBERTO FERRARO, and MARIA LUISA FERRARO,

*Petitioners,*

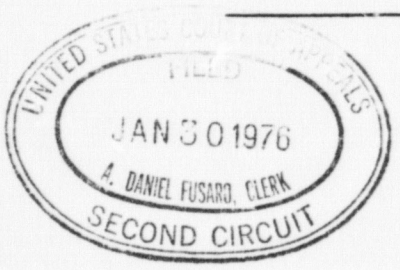
-against-

IMMIGRATION AND NATURALIZATION SERVICE,

*Respondent.*

*Petition for Review of an Order of the Board of Immigration Appeals*

## APPENDIX FOR PETITIONERS

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UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service

File: A16 574 900 - Buffalo, N. Y.
A30 350 039 - " "

OCT 7 1974

In the Matter of )

RAFAEL ALBERTO FERRARO )
and
MARIA LUISA FERRARO )

Respondents )

IN DEPORTATION PROCEEDINGS

CHARGES: (Both) I & N Act - Section 241(a)(2) - entered without inspection

APPLICATION: Termination of proceedings or voluntary departure

In Behalf of Respondents:

Albert D. Garganigo, Esq.
225 Broadway
New York, N. Y. 10007

In Behalf of Service:

Gordon W. Sacks, Esq.
Trial Attorney
Buffalo, N. Y.

DECISION OF THE IMMIGRATION JUDGE

DISCUSSION: The respondents are aliens, natives and citizens of Argentina who are husband and wife. They were admitted to the United States for permanent residence, the husband on June 20, 1969 and the wife on April 9, 1971. The Order to Show Cause asserts that each of them is now deportable from the United States by reason of the fact that they last entered the United States on May 28, 1973 at Churubusco, New York and at the time of their entry they were not inspected by an immigration officer as required by law.

There is little or no dispute as to the basic facts in the case, the only substantial question arising had to do with the mental state of the respondents at the time of their last entry into the United States and as to the legal effect to be attributed to these facts.

Mr. Ferraro testified (page 21 of the record) that on Friday May 25, 1973 he left Jersey City, New Jersey to go to Toronto to visit his relatives who resided in Canada. He had heard that some other relatives of his, Mr. and Mrs. Guzman who were cousins of his from Argentina and several children were due to arrive in Canada at the house of his other relatives in Canada and he wanted to visit them. Apparently Mr. Ferraro had been in Canada on a previous occasion in April of 1973 on a visit to this relative in Canada who is his brother-in-law and he encountered a man known as La Espanol in a service station. Although this man asked him some questions about people coming with tourist visas from Argentina, he claims that there was no discussion at that time of his ability to get people into the United States. He stated that he asked him to bring some cigarettes with him the next time he came to Canada to visit his relatives. It was on his most recent trip to Canada on May 25, 1973 that he brought the cigarettes to a store which this individual has near the gas station. This was the Memorial Day weekend and Mr. Ferraro planned to stay in Canada until Monday and to return to the United States on that Monday. The then counsel for the respondents conceded (page 8) that after they arrived in Toronto and discussed the matter with their cousins Mr. and Mrs. Guzman and described life in the United States, Mr. Guzman stated

that he would like to come to the United States and asked what were the possibilities. Mr. Ferraro told him that he had heard of a man in the area who had stated that he could arrange for legal entry into the United States and Mr. Ferraro went with him to see this man to see if he could make arrangements for a legal entry for the family into the United States. The man told them that the charge would be $600 and that they were to come back on the following day, Sunday, with the money. They came back with the $600 which they gave him and were told to come back at 7:30 P.M. when they would be introduced to a man who would lead them into the United States and would make arrangements for them to gain legal entry into this country. At the stated place of rendezvous a white car drove up with two men in it and Mr. Ferraro and his wife and the Guzman family were told to follow this white car and that he would make all the arrangements. At page 13 of the record counsel for the respondents agreed with the Trial Attorney's description of what happened, namely that the man who received the $600 told the respondents and the Guzman family that they would drive to an area and to a certain point where they would stop the cars and the Guzmans would get out of the car belonging to the Ferraro's and into the white car which they were following, and from then on the people in the white car would know what to do. They then set out from Toronto, the Ferraros and all of the Guzmans in the Ferraro car and followed the white car for a number of hours until approximately 3 o'clock in the morning. At this point the Ferraros apparently became aware of the fact either that they were approaching the border or crossing the border and they signaled the white car for the purpose of effecting the change which had been

promised to them. However, the white car did not stop immediately and they both apparently proceeded through the border area. The Ferraros, having been admitted to the United States for permanent residence, had their respective forms I-151 in their possession which would have entitled them to admission into the United States if they had presented themselves for inspection and provided, of course, that they were not excludable for some reason other than a purely documentary one. It is their contention that they knew they were crossing a border but they expected a legal inspection. The respondents deny they had any prearranged plan of helping the Guzmans enter the United States illegally when they went to Canada and they deny receiving any part of the $600 which had been paid for the purpose of getting the Guzmans into the United States. They followed the white car as directed until they came to a sign which had the word "Immigration" on it, in English. He explained at that point he didn't know whether he was inside the United States or coming to an immigration station, but when he saw the sign he signaled with his lights to the white car to stop. The driver did not stop however, but he indicated with his hand for the Ferraro car to continue behind him. He continued for some 3 or 4 blocks until the white car stopped and he pulled up beside him. At that point one of the men in the car who was the same La Espanol with whom he had dealt in Toronto told him to take the road to the left and that would take him to New York. He followed the instructions of the man in the white car, went to the left and arrived at highway 87, he crossed route 87 and stopped at a gasoline station. He testified (page 41) that

when he got to the gas station he knew, at that point, that he was illegally in the United States. He couldn't state specifically why it was that he knew at that point he was illegally in the United States but that he knew that he became very nervous. Apparently he was nervous because when he got to route 87 and saw signs to New York he knew that hy had missed the inspection station (page 42). Mr. Ferraro was unable to explain what he expected to happen if they had come to an immigration station, in view of the fact that the Guzmans only had Argentine passports and did not have forms I-151, the so-called "green card" which the Ferraros knew was necessary for their own admission into the United States. The car containing the Ferraros and the Guzmans was stopped by the Border Patrol after they stopped at the gas station and entered route 87 going south towards New York. The evidence indicated that the route which was followed by both cars was one which took them through the port of entry of Churubusco, a port of entry which was closed at that time of the night. Apparently there are instructions on signs at the Churubusco station stating that aliens who are to be inspected should proceed to the inspection station at Chateaugay to be examined. The route which would be followed for people who wish to be inspected would be to proceed as the Ferraros did, down the road to route 11, which is the road on which they turned left to go to route 87. Instead of turning left they should have turned to the right to route 374 and then north back to the border to the inspection station at Chateaugay. The two people who were in the white car, namely Jack Filizof and Morris Ander had, in fact, turned to the

right and proceeded in that direction. Apparently a border patrolman had observed the communication between the leading white car and the Ferraro car at the intersection of the road from Churubusco and route 11 but followed the Anders car when it went across the bridge. He followed the Anders car and stopped it when it passed the junction of route 374 and 11 where it was supposed to have turned to Chateaugay for inspection. The Border Patrolman was about to permit the white car to return voluntarily to Canada when he was alerted by his superior officer to bring the people in for questioning, presumably because another patrolman had picked up the Ferraros and Guzman.

Filixof and Anders were given a deportation hearing by another Immigration Judge as a result of which they were ordered deported to Canada on the charge that they had entered without inspection. Mr. Ferraro had testified in the deportation proceeding of the two smugglers as had Mr. Guzman. I indicated in the course of the hearing before me on June 19, 1973 that I was prepared to sustain the charge of entry without inspection on the evidence before me. The Trial Attorney however, felt that perhaps Mr. Ferraro had given testimony in the hearing of the two smugglers which was inconsistent with his testimony before me. He therefore asked for an opportunity to have that other record relating to the smugglers transcribed so that he could use it for purposes of cross-examining Mr. Ferraro.

In the course of the hearing before me, I suggested to the then counsel for the respondent that it might be wise for him to file a new application for a visa so as to establish a priority date, in view of the fact

that the Ferraros had a United States citizen child and that if the decision in this matter was adverse to the respondent, he might have a substantial period of time accumulated for the obtaining of another visa.

At the time of the continued hearing before me on August 6, 1974, the Ferraros were represented by their present new attorney who advised me that he had, in fact, taken the steps suggested by me at the close of the previous hearing but that such steps were taken only after his substitution and that there was a priority date of May 6, 1974. It also was evident at the hearing of August 6th that the female respondent was expecting the birth of another child and the expected date of delivery was September 1974.

At the continued hearing of August 6, 1974 the Trial Attorney sought to establish some inconsistency between a statement of the respondent in his own hearing and in his deportation hearing of the smugglers but without substantial success. The testimony of Mrs. Ferraro was taken and she stated that she had been aware of the arrangements between her husband and the Guzman family to pay $600 for a so-called legal entry into the United States. She was in the car when the arrangements were made to follow the white car into the United States. She stated that in the Ferraro car, in addition to her husband and herself there were the Guzman family consisting of two adults and two children and her own son whom she carried in her arms. She stated that she didn't know when they entered the United States because she had been asleep for perhaps

five or six hours and it was not until the Border Patrolmen stopped them at the service station that she became fully awake and they were taken to the Immigration office.

It seems clear that these aliens did, in fact, enter the United States without inspection and are deportable on the charge contained in their Orders to Show Cause.

The record is clear that the respondents came to Canada with the intention of spending a limited time in that country over the Memorial Day weekend. They intended to and did return to the United States on May 27th and May 28th, 1973 so that the male respondent could be back at work on Tuesday, May 29th, as he was obligated to be. They made arrangements with a smuggler for the payment of $600 for which he promised them that he would lead them into the United States with the Guzmans who had recently come from Argentina, would be given a legal inspection. I find the testimony of the Ferraros in this respect unbelievable, in view of the fact that they had had considerable experience with the immigration authorities on the processes of obtaining an immigrant visa in the recent past. Furthermore, Mr. Ferraro knew that the cost to him of obtaining his visa had been approximately $30. Even to an unsophisticated person the difference between $600 and $30 should have alerted him. In any event the belief of the respondent as to what was going to take place after they crossed the border is immaterial. They certainly knew that they had started out from Canada with the intention of entering the United States. Assuming for the moment that they succeeded in entering the United States without being

aware of it at the precise moment on which they crossed the border between Canada and the United States there came a time when they arrived at the filling station on route 87 when Mr. Ferraro became aware of the fact that he probably was in the United States. He was led to this conclusion by the fact that the station was an Esso station, that he paid for the gas in American money and received change in American money and he then left the station and followed the sign which directed him to New York.

Assuming that his mental state was one of confusion and uncertainty until he arrived at the filling station, there is no doubt in my mind that when he left the filling station and took the road south to New York he was then effecting an entry without inspection. Obviously, where there are unmanned inspection stations along the Canadian border it might be possible for a person, unacquainted with the English language, and unable to read the signswhich direct him to submit himself for inspection at another place on the Canadian border, to enter the United States without being subject to the charge of entry without inspection. If a person were asleep as the female respondent claims to have been and upon awakening finds herself in the United States, and then immediately proceeds to attempt to return to Canada, it may well be that the charge of entry without inspection would not be sustained. However, when that person who has entered the United States inadvertently, or without an intention to do so discovers that he is, in fact, in the United States he then has an obligation to either return to Canada or to submit himself to inspection at the nearest immigration station. The abandonment of that plan and the adoption of a

plan to proceed to New York as if nothing had happened constitutes entry without inspection. It is a physical crossing of the border which admittedly took place in the instant case, coupled with a lack of the proper inspection, and a mental state which formulated the decision to continue into the United States and thus ratified the physical crossing of the border which constitutes the act of entry without inspection. It cannot be emphasized too strongly however that the entire testimony must be largely suspect in view of the fact that the entry in question took place with a carload of people who had no right to enter the United States at all and who had paid $600 for the purpose of getting into the United States.

Even under the doctrine laid down by the Board of Immigration Appeals in Interim Decision 2238, Matter of Pierre which states that an alien has not effected an entry into the United States unless while free from actual or constructive restraint he has crossed into the territorial limits of the United States, nevertheless, these aliens have effected an entry. Certainly from the time the Canadian border was crossed on route 189 on the way to route 11 where a Border Patrolman observed them, they were free from restraint for a distance of perhaps 8 or 10 miles. Thereafter, the patrolman on duty at the intersection of route 189 with route 11 followed the smugglers towards Chateaugay and route 374. It was not until sometime later that these respondents were picked up on route 11 and presumably followed until they left the gas station on route 87 to go to New York.

The respondents are therefore clearly deportable from the United States on the charge contained in their Orders to Show Cause. It may be noted

parenthetically that they are not protected from the effects of this charge by Section 241(f) by reason of the birth of a United States citizen child. Interim Decision 2251, Matter of Ferreira.

Nor are these respondents in any wayoprotected by the decision of the Supreme Court in Rosenberg v. Fleuti, 374 U.S. 449, decided June 17, 1963. The Board of Immigration Appeals in Matter of Kelk, 11 I&N Dec. 103, held that if the immigration laws and the established techniques of inspection are to have any meaningful and rational application it must be held that the case of Rosenberg v. Fleuti does not apply where a resident alien is charged with entry without inspection following a casual visit to a foreign country.

The question does remain as to what relief may be given to these respondents under the circumstances of this case. There is no form of relief other than that of voluntary departure which I can grant. It may be of some interest however to point to two decisions by the Board of Immigration Appeals in this type of situation, one of which is In re Enrique Gutierrez-Lavin, file A8 405 405, decided June 11, 1965 and In re Mario Romero-Ibarra, file A10 553 849, decided June 8, 1965. Both of these concerned entries without inspection by a permanent resident who had made a temporary trip to Mexico but had lost his form I-151 and entered thereafter without inspection, although the immigrant inspector at the border in one case had instructed him to secure two photographs and make an application for a replacement of his Alien Registration Card. In the second of the two cases the resident alien sought to reenter from Mexico in an intoxicated condition. The inspecting officer retained his Alien Registration Card and told him

to return several days later and seek admission. Instead, the alien sought to enter over the bed of the Rio Grande River and was finally caught in the United States.

In both cases the Board of Immigration Appeals sustained the charge of entry without inspection. However, the Board, in both cases directed that the case be remanded to either the Special Inquiry Officer or the Service to give the respondent an opportunity to secure his Alien Registration Card and thereafter make proper application for admission to the United States as a returning resident. In the second case it was also suggested that either the form I-151 be returned to the respondent so that he could make proper application for readmission to the United States at a regular port of entry and that consideration might be given to a waiver of documents under Section 211(b) of the Act.

Obviously in the instant case the forms I-151 of the respondents are in the possession of the Immigration and Naturalization Service. The return of those documents to the respondents so that they can effect a proper entry into the United States rests within the discretion of the Immigration and Naturalization Service. Even the Board of Immigration Appeals was reluctant to direct the Service to take such action, but it is also interesting to note that apparently it is the opinion of the Board of Immigration Appeals that under circumstances similar to the instant case, the respondents, by entering the United States without inspection, did not abandon or forfeit their status as persons entitled to return to an unrelinquished domicile in the United States. The Board's reference to a

a waiver under Section 211(b) of the Act would seem to so indicate. However, in view of the ambiguous nature of the Board's disposition in the second of these two cases providing for either the return of the form I-151 or the waiver, I am not inclined to consider the waiver at this point, nunc pro tunc. It would seem to me that the least that could be required of these aliens is to depart from the United States with their I-151's and to return properly and to subject themselves to inspection.

The respondents have indicated that if ordered deported they would prefer to be sent to Argentina. In view of the fact that the female respondent is in an advanced state of pregnancy and expects the birth of her child in September of 1974 and needs the support and presence of her husband, they will be given voluntary departure within a period of six months from the date of this order.

ORDER: IT IS ORDERED that in lieu of an order of deportation the respondents be granted voluntary departure without expense to the government on or before FEBRUARY 14, 1975 or any extension beyond such date as may be granted by the District Director and under such conditions as the District Director shall direct.

IT IS FURTHER ORDERED that if the respondents fail to depart when and as required the privilege of voluntary departure shall be withdrawn without further notice or proceedings and the following order shall thereupon become immediately effective: the respondents shall be deported from the United States to Argentina on the charge contained in the Orders to Show Cause.

IRA FIELDSTEEL
Immigration Judge

ROMERO—URANGA

A-14

U. S. DEPARTMENT OF JUSTICE
BOARD OF IMMIGRATION APPEALS

JUN 8 - 1985

File: A-10553849 - El Paso

In re: MARIO ROMERO-URANGA

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: George A. McAlmon, Esquire
508 Southwest National Bank Bldg.
El Paso, Texas

CHARGES:

Order: Sec. 241(a)(2), Immigration and Nationality Act [8 USC 1251(a)(2)] - Entered without inspection

Lodged: None

APPLICATION: Termination of proceedings or waiver nunc pro tunc under Section 212(c), Immigration and Nationality Act [8 USC 1182(c)]

This case is before us on appeal from a decision of a special inquiry officer denying the application for a waiver under 8 USC 1182(c), granting voluntary departure and directing that the respondent be deported if he fails to depart voluntarily.

The respondent is an unmarried male, native and citizen of Mexico, whose birth certificate indicates that he is now 21 years old. He was lawfully admitted for permanent residence on July 3, 1956 and

last entered the United States on July 2, 1964 after a short absence in Mexico. The special inquiry officer found that on the latter occasion the respondent entered without inspection. The issues to be determined are whether the respondent is deportable and, if so, whether a waiver should be granted under 8 USC 1182(c).

We have carefully reviewed the entire record. The special inquiry officer has fully discussed the facts relating to the entry without inspection which are briefly as follows. The respondent had crossed the border into Juarez, Mexico about 5:30 or 6 p.m. on Thursday, July 2, 1964. He applied for readmission to the United States about 8:30 p.m. on that day at which time he was intoxicated and was given a brief medical examination. The immigration officer retained the respondent's alien registration receipt card and told him to return the following Monday. He departed to Juarez but about 10:15 p.m. on the same day he crossed from Juarez to El Paso over the bed of the Rio Grande River. Upon being stopped by an immigration officer, he broke away but was caught in El Paso after a chase. The place where he crossed the Rio Grande was in full view of the Santa Fe Street Bridge where immigration officers are stationed. The respondent stated that he was still intoxicated at that time. Exhibits 7 and 8 show that the respondent was convicted of violating 8 USC 1325 for entering the United States at a place other than as designated by immigration officials and that he was sentenced to imprisonment for three months. However, execution of the sentence was suspended and he was placed on probation.

The special inquiry officer discussed the question of whether the respondent had made an entry within the meaning of Rosenberg v. Fleuti, 374 U.S. 449 (1963). On March 29, 1965 the Service representative

filed a memorandum of law stating that the lengthy discussion of "entry" by the special inquiry officer was inappropriate because the respondent's conviction under 8 USC 1325 established that he made an entry on July 2, 1964 pursuant to the doctrine of collateral estoppel. The memorandum of law and the special inquiry officer's decision were prepared prior to our decision of April 2, 1965 in Matter of Kolk, Int. Dec. 1443. There we held that Rosenberg v. Fleuti, supra, was inapplicable in the case of an alien who entered without inspection. Hence, we must hold that the respondent's coming into the United States at about 10:15 p.m. on July 2, 1964 constituted an entry for immigration purposes. Since at that time he entered at other than a designated port, we conclude that he entered without inspection and is deportable on the charge stated above. However, we consider it appropriate to state that we reject the contention of the Service that the doctrine of collateral estoppel may be utilized in a deportation proceeding inasmuch as Title v. Immigration and Naturalization Service, 322 F. 2d 21 (9th Cir., 1963), holds to the contrary.

The respondent applied (Ex. 9) for a waiver nunc pro tunc under Section 212(c) of the Immigration and Nationality Act [8 USC 1182(c)] with a view of curing his entry without inspection. As the special inquiry officer indicated, we held in Matter of T-, 5 I&N Dec. 389 (1953), and Matter of M-, 5 I&N Dec. 642 (1954), that the deportation charge of entry without inspection cannot be cured under the discretionary authority in 8 USC 1182(c). It follows that the special inquiry officer's action in denying this application for relief was correct. Accordingly, the appeal will be dismissed.

The special inquiry officer discussed certain favorable factors in the case. The respondent has not been convicted of an offense other than the violation of 8 USC 1325 mentioned above. He has been assisting in

the support of his parents and actually supported the household for about one year prior to the deportation hearing because his father had been out of work. The respondent came to the United States when he was about 12 and has lived in this country almost nine years. The case does not involve an attempt to enter the United States surreptitiously since the respondent crossed the Rio Grande River in full view of the Santa Fe Street Bridge. He stated that he did so only because he was intoxicated and wanted to return to his home in El Paso to sleep in order that he might go to his job the following day.

The special inquiry officer stated (decision, p. 11) that "the respondent will undoubtedly desire to seek the issuance of a new immigrant visa and thereby regain his status as a lawful permanent resident of the United States". Under the circumstances of this case, we do not believe that the respondent's technical entry without inspection while intoxicated should be considered as an abandonment of his lawful permanent residence in the United States. The special inquiry officer has granted voluntary departure. It seems to us that the respondent can adjust his immigration status through voluntary departure and application for readmission to the United States at a regular port of entry. Apparently the respondent may be considered as being within the provisions of 8 CFR 211.1 if the Service returns his Form I-151 to him at this time, or consideration may be given to the provisions of 8 USC 1181(b) and 1182(c) at the time of the alien's future application for admission to the United States.

ORDER: It is ordered that the appeal be and the same is hereby dismissed.

MB: rfm Chairman

GUTIERREZ—LAVIN

A-18

UNITED STATES DEPARTMENT OF JUSTICE
Board of Immigration Appeals

JUN 1 1 1965

File: A 8 405 405 - El Centro, California

In re: ENRIQUE GUTIERREZ-LAVIN

IN DEPORTATION PROCEEDINGS

CERTIFICATION

ON BEHALF OF RESPONDENT: Pro Se

ON BEHALF OF I&N SERVICE:; William S. Howell
Trial Attorney
(Brief filed)

CHARGE:

Order: Section 241(a)(2), I&N Act [8 USC 1251(a)(2)]-
Entered without inspection

Lodged: None

APPLICATION: None

The Special Inquiry Officer has terminated the proceedings in this case and has certified his decision to this Board for review. The Trial Attorney for the Immigration and Naturalization Service has submitted a brief in opposition to the action of the Special Inquiry Officer. The respondent has waived his right to file a brief or other written statement for our consideration.

The respondent is a 37 year old single male alien. He entered the United States near Calexico, California, on or about February 14, 1965, and he was then not inspected by an Immigration Officer. On November 25, 1952, the respondent had been admitted as a permanent resident upon presentation of an immigrant visa which had been issued to him by the American Consulate at Bilbao, Spain, on November 20, 1952. The record indicates that since his admission as a permanent resident on November 25, 1952, he has been out of the United States on but two occasions visiting Mexico. His second and last departure from the

A 8 405 405

United States was on February 13, 1965, when he went to Mexicali, Mexico for the purpose of getting a hair cut and sight seeing in Mexico. The total time spent in Mexicali was approximately 24 hours. The respondent's testimony is to the effect that he accompanied a Mexican co-worker from Calexico, California to Mexicali at that time and he had inquired of this companion whether he would encounter any difficulty in returning to the United States inasmuch as he had lost his "green card". The friend allegedly informed the respondent that he would have no difficulty in returning. Upon his seeking re-entry from Mexico, he was not in possession of any money. He presented himself for inspection to the United States Immigration Officer who, learning from the respondent that he did not have the necessary "green card" but nevertheless was a permanent resident of the United States, instructed the respondent to secure two photographs and return to make an application for a replacement alien registration card. The respondent in order to avoid delay in Mexico which might affect his employment in the United States, entered the United States through a truck gate, unnoticed by any United States Immigration authority. He testified that at that time he knew it was necessary for him to obtain a replacement alien registration card, but he did not apply for such because he believed he had insufficient residence in Los Angeles and further that his employment was on a ranch outside of that city.

The charge contained in the Order to Show Cause is based upon the respondent's alleged entry without inspection. The Special Inquiry Officer in considering the applicability of this charge to the above-described entry by the alien took notice of the decision of the Supreme Court in Rosenberg v. Fleuti, 374 U.S. 449. In so doing he sought to answer the question of whether the alien's entry without inspection under the circumstances above described would preclude termination of the proceedings under the ruling of the Supreme Court in the Fleuti decision. He found that the respondent had no intention of interrupting his permanent residence in the United States as a result of his short visit to Mexicali and that he maintained at all times an intention to return to the United States in order to resume his residence and employment in this country. The Special Inquiry Officer considered the meagre education of the respondent (he has had four years of schooling), his mistaken belief based upon the information given him by his friend and co-worker who was a native of

A 8 405 405

Mexico, and also a legal resident of the United States, and the respondent's apparent panic and indecision when he learned that it was necessary for him to have an alien registration card in order to re-enter the United States. Finally, the Special Inquiry Officer found that the respondent testified in a forthright manner with no intent to evade.

In considering the application of Fleuti, the Special Inquiry Officer makes note of two decisions by this Board relating to situations similar to the instant case. In Matter of Karl, Interim Decision 1326, we pointed out that we were not prepared to hold at that time that every entry without inspection following a visit outside the United States, regardless of its brevity, would completely preclude an application of Fleuti. In Matter of Kolk, Interim Decision 1443, we stated: "We are of the opinion that a reopening of the proceedings for the purpose of reconsidering our decision of April 25, 1962 in light of the Supreme Court's ruling in the Fleuti case (supra), decided some eleven months later on June 17, 1963, would serve no useful purpose because Fleuti does not apply to an alien who entered the United States without inspection." The Special Inquiry Officer distinguishes Kolk from the instant case on the ground that Kolk had re-entered the United States on two occasions by falsely claiming to be a United States citizen. The Special Inquiry Officer points out that the respondent herein did not falsely claim United States citizenship or otherwise resort to fraud. Furthermore, it is pointed out that in the instant case the respondent attempted to return lawfully and presented himself for inspection before making his entry without inspection; whereas, Kolk, on both occasions made false claims to United States citizenship. The Special Inquiry Officer held that for the respondent who has resided lawfully in the United States for over 13 years a deportation under the present circumstances would certainly not be warranted and would seem to be a "harshly unrealistic exclusion from the Supreme Court's rationale in the Fleuti Decision."

The facts of the instant case present a situation seemingly warranting sympathetic action. The application of Fleuti is difficult. However, where as here, the respondent avoided the proper methods of entry into the United States, it is our conception that Fleuti enunciated

A 8 405 405

a principle based on two separate factors, that is, departure from the United States and re-entry thereafter. We agree here that the departure of the respondent was indeed innocent, casual and not a meaningful interruption of his residence in the United States. We find it difficult, however, to hold that his re-entry into the United States was innocent. We also find it difficult to distinguish between various types or means of entering the United States without inspection. The statute contains no distinction and we are not aware of any distinctions made in case law or otherwise as to manners of entering the United States without inspection. Of course, it is obvious that if Fleuti is geared solely to departure as innocent, casual and not meaningful interrupti ve, then conceivably it could be held that no inspection upon return would be necessary. This proposition, of course, presents obvious difficulties in determing the nature of the departure. Since such determination is necessary, then of course, inspection at the time of return is the sole and logical barrier to be surmounted before Fleuti can be applied. Our action in this case is not an affirmation of the holding of the Special Inquiry Officer in his application of the Fleuti principle. However, because of the sympathetic features of the case, we think it appropriate to reopen the proceedings herein and remand them to the Special Inquiry Officer in order to give the respondent an opportunity to secure his alien registration card and thereafter make proper application for admission to the United States as a returning resident. Accordingly, the following order will be entered.

ORDER: It is ordered that the proceedings herein be reopened and remanded to the Special Inquiry Officer for the purposes outlined above and for such other purposes as may be appropriate in the premises.

Chairman

TJG:mld

December 31, 1974

District Director
United States Department of Justice
Immigration and Naturalization Service
U. S. Court House
Buffalo, New York 14202

A18 574 900 A30 350 039

Re: In the Matter of
Rafael Alberto FERRARO and
Maria Luisa FERRARO
Respondents

Dear Sir:

As you know, on October 7, 1974, a decision was rendered by Judge Fieldsteel in the above matter and a timely Notice of Appeal from this decision was duly filed on October 23, 1974.

Although this matter is presently pending before the Board of Immigration Appeals in Washington, I am writing to you in the hope that we can resolve it without the need of going before the Board.

Specifically, I refer you to pages 12 and 13 of Judge Fieldsteel's decision, wherein he states that since it is apparently "the opinion of the Board of Immigration Appeals that under circumstances similar to the instant case, the respondents, by entering the United States without inspection, did not abandon or forfeit their status as persons entitled to return to an unrelinquished domicile in the United States", he feels that these aliens could

be required to depart from the U. S. with their I-151 forms and, thereafter, subject themselves to inspection and make a proper reentry.

I am in agreement with Judge Fieldsteel that if this procedure could be followed, this matter could be terminated to the satisfaction of all parties involved and, accordingly, I respectfully request that you accept this letter as formal application for return of my clients' I-151 cards in order for them to accomplish the required exit and reentry as suggested in the judge's decision.

I would appreciate hearing from you at your earliest convenience. Thank you for your cooperation.

Very truly yours,

ADC:mc

ALBERT D. CARMICO

UNITED STATES DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE
United States Court House
Buffalo, New York 14202
January 15, 1975

A-24
PLEASE REFER TO THIS FILE NUMBER
A18 574 900
A30 350 039

Albert D. Garganigo, Esquire
225 Broadway - Suite 1503
New York, New York 10007

Re: Rafael A. Ferraro and
Maria L. Ferraro

Dear Mr. Garganigo:

Your suggestion of December 31, 1974 is unacceptable. The statement cited in the suggestion is not an acceptable interpretation of the position of the Board of Immigration Appeals and we are hopeful of clarification.

Therefore, the I-151's shall not be relinquished.

Very truly yours,

For the District Director

Gordon W. Sacks, Trial Attorney

# United States Department of Justice

Board of Immigration Appeals

Washington, D.C. 20530

Files: A18 574 900 - Buffalo
A30 350 039

JUN 1[illegible] 1975

In re: RAFAEL ALBERTO FERRARO and
MARIA LUISA FERRARO

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENTS: Albert D. Garganigo, Esquire
225 Broadway, Suite 1503
New York, New York 10007

ON BEHALF OF I&N SERVICE: Anthony M. Degaeto
Appellate Trial Attorney

ORAL ARGUMENT: March 4, 1975

CHARGES:

Order: Section 241(a)(2), I&N Act (8 U.S.C. 1251 (a)(2)) - entered without inspection (both respondents)

APPLICATION: Termination of proceedings

These cases present an appeal from a decision of the immigration judge finding the respondents deportable and granting their applications for the privilege of voluntary departure, with an alternate order of deportation to Argentina in the event of their failure to depart when and as required. The appeal will be dismissed.

Our review of the record, including the contentions of counsel on appeal, satisfies us that the hearing was fair and that deportability of the respondents has been established

A18 574 900
A30 350 039

by clear, convincing and unequivocal evidence. We are also satisfied that the immigration judge properly applied the pertinent legal principles. He granted the respondents the only discretionary relief available to them in the circumstances of these cases. Accordingly, the appeal will be dismissed and the order of the immigration judge affirmed.

ORDER: The appeal is dismissed.

FURTHER ORDER: Pursuant to the immigration judge's order, the respondents are permitted to depart from the United States voluntarily within 130 days from the date of this order or any extension beyond that time as may be granted by the District Director; and in the event of failure so to depart, the respondents shall be deported as provided in the immigration judge's order.

Chairman

A 202 Affidavit of Personal Service of Papers

LUTZ APPELLATE PRINTERS, INC.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RAFAEL ALBERTO FERRARO, and MARIA LUISA FERRARO,

Petitioners,

- against -

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

*Index No.*

*Affidavit of Personal Service*

*STATE OF NEW YORK, COUNTY OF* NEW YORK *ss.:*

*I,* James A. Steele *being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at* 310 W. 146th St., New York, N.Y.

*That on the* 30th *day of* January *19*76 *at* 1 St. Andrews Plaza, New York, New York

*deponent served the annexed* Appendix *upon*

U.S. Attorney & Immigration and Naturalization

*the* Attorney *in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the herein.*

*Sworn to before me, this* 30th
*day of* January *1976*

Robert T. Brin

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31 0418950
Qualified in New York County
Commission Expires March 30, 1977

James A. Steele
JAMES A. STEELE